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POLICY PROBLEMS OF SMOKING AND HEALTH

Recent litigation raises an interesting question of legal policy: should the cigarette industry pay plaintiffs for injuries caused by smoking without reference to whether the product is inferior to that which is generally supplied by all competitors?

This Comment will explore general arguments for and against curbs on the cigarette industry; consider available tort theories; evaluate the major cigarette cancer cases; and offer suggestions as to the preferable policy with alternative means of implementing it.

PROS AND CONS

In 1964 the Surgeon General reported, "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."¹

The basic argument for governmental attack is one of public health. One might contend that smoking and health is a private, not public, problem. However, the prevalence of lung cancer, emphysema, bronchitis, and heart disease and the statistical evidence linking these diseases with cigarette smoking have prompted the "public" classification.² Even cigarette-health litigation initiated by private persons falls into the public category, because liability of a cigarette manufacturer will be a public sanction against the product. Thus the "remedial action" can be judicial as well as executive and legislative.

The argument against governmental action is largely one of individual freedom.³ How far should the legitimate governmental concern for public health be extended into an area of private choice? The decision to smoke is as personal as the choice of foods. Today, however, we unquestionably accept government's intervention aimed at eliminating impure foods. Cigarette manufacturers themselves have been subject to like sanctions when their products were adulterated.⁴ Because the

1. 111 CONG. REC. 13892 (1965) (remarks of Sen. Magnuson).

2. See 111 CONG. REC. 13900-13902 (1965) (remarks of Senator Moss).

3. 111 CONG. REC. 13918 (1965) (remarks of Senator Ervin). The Senator quotes from a Wall Street Journal editorial entitled, "Can Government Break All Our Bad Habits?" which suggests that a thorough anti-smoking campaign would inject the federal government into matters of purely personal behavior and private decisions.

4. Block v. Liggett & Myers Tobacco Co., 162 Misc. 325, 296 N.Y.S. 922 (1937) (piece of razor blade in cigarette). Judgment for plaintiff was reversed for lack of privity. See note 21 *infra*, and accompanying text.

Exploding cigarettes formed bases for inferences of negligence in Liggett &

present problem is grounded on the idea that the ordinary cigarette is unsafe, it is more pointedly individual and would seem to call for strong evidence of popular consent to restraints. Governmental action can range from the direct prohibition of smoking or of cigarette production, to mere recognition and publicity of the health problem. Somewhere between these two would be imposition of financial penalties on the tobacco industry with the remedial intent of pricing cigarettes out of reach of at least some segments of the smoking public. The harsher the penalties, the more likelihood of achieving indirect prohibition, and the more compelling the reasons to seek representation of popular views through legislative vote.

In addition to the public health-individual choice considerations, economic factors must be faced. The known "facts" concerning cigarette induced diseases, though still speculative, are sufficiently alarming to provoke the question, "Who should be paying the costs?" The choice of answers is limited. The status quo compels the individual victim to bear the costs, in which case the general public pays at least a percentage through the media of charity hospitals, public health services, social security, welfare programs, and the like. Or the cigarette manufacturer can be made to pay the costs, in which case the smoking public will pay through increased prices. Neither solution seems ideal, which suggests the need to search for a compromise.

It is doubtful that the status quo will remain.⁵ Although there is still considerable doubt as to cause-in-fact of lung cancer⁶ there are enough indicia to support an argument for the imposition of products liability. The fundamental idea of enterprise liability, that a producer should pay the costs of damage caused by his defective product, has connotations of unjust en-

Myers Tobacco Co. v. De Lape, 109 F.2d 598 (9th Cir. 1940); Lindner v. Liggett-Myers Tobacco Co., 23 N.Y.S.2d 923 (1940); Meditz v. Liggett & Myers Tobacco Co., 167 Misc. 176, 3 N.Y.S.2d 357 (1938).

5. That the general public pays some costs of the diseases involved in the smoking-health problem hardly needs elaboration; contraction of the diseases is not keyed to the victim's ability to pay. Lung cancer kills 47,000 people a year in this country. As early as 1965 the Public Health Service estimated that some 300,000 people a year die prematurely in this country as a result of one disease or another associated with cigarette smoking. See 111 CONG. REC. 13903 (1965) (remarks of Senator Kennedy of New York).

McNiece & Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHN'S L. REV. 255, 258-59 (1952): "The theory of rugged individualism in negligence law, as in other realms of human existence, had yielded, for good or ill, to the theory of what might be called, paradoxically enough, 'social individualism' . . . a process of adjustment between individuals in which society has a vital interest."

6. 111 CONG. REC. 13896 (1965) (remarks of Senator Morton).

richment.⁷ But is enterprise liability, as we know it in relation to other products, the best answer available at present?

The economics of enterprise liability is based on the predictability of the percentage of defective products that reaches the market. The producer includes the costs of judgment payments in his pricing calculations so that the consumers who buy his product indirectly pay for damages to the few who are actually injured.⁸

Since the "ordinary" cigarette rather than the defective cigarette is the alleged health hazard, the manufacturer is deprived of two elements of the usual enterprise liability formula: first, the ability through careful production methods of keeping the damages at a minimum percentage; and, second, predictability of the percentage. Faced with virtually unlimited damage awards for cancer, emphysema, and possibly heart disease, the cigarette manufacturer would find it literally impossible to include liability allowances in his pricing; and a pack of cigarettes might soon be priced out of reach.

Comparing the plight of the cigarette manufacturer to the disease toll,⁹ one is likely to retort, "So what?" But before this comparison is allowed to lead to a conclusive policy decision against the cigarette industry, it should be pointed out that the number of persons who would be economically affected by a restraint on the cigarette industry at least equals the number medically affected by smoking. Tobacco is a major United States industry.¹⁰ Tobacco taxes provide major support to government on all levels.¹¹ Thus those who would discount all resistance to imposing liability or other restrictions on the cigarette industry as unduly engendered by a powerful cigarette lobby

7. *Santor v. A. & M. Kara-Gheusian, Inc.*, 44 N.J. 52, 65, 207 A.2d 305, 312 (1965): "The purpose of such liability is to insure that the cost of injuries or damage . . . resulting from defective products is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves. . . ."

8. Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961).

9. See note 5 *supra*.

10. More than \$7 billion is spent for cigarettes annually. About 750,000 farm families grow tobacco in 21 states; it is the country's fifth largest cash crop. Tobacco products factories number about 500 in a total of 30 states, giving direct employment to more than 96,000 people. Distribution involves some 4,500 wholesalers, 1.5 million retailers, and in the United States more than 1.5 million businesses share in the tobacco trade supplying equipment, materials, and the like. See 111 CONG. REC. 13898 (1965) (Statement by Senator Bass.)

11. *Id.*: "The Federal Government collects more than \$2 billion annually in tobacco excise taxes, State governments about \$1.2 billion, and municipal governments more than \$50 million. . . . About half of what the consumer spends for a package of cigarettes is paid to government treasuries."

should realize that although the lobby exists for "selfish" reasons, it is a many-thousand-voiced selfishness.

A final economic argument is against judicial, rather than legislative, imposition of liability and relates to potential dire effects on other industries. Products that are "unavoidably unsafe" and not "defective" per se are not now faced with liability.¹² If this policy is discarded and manufacturers of such products as whiskey and candy are laid open to claims by cirrhosis and diabetes victims, our entire economic structure could possibly be threatened.

The blood-hepatitis cases clearly reveal the judicial policy-forming process. Blood used for life-saving transfusions sometimes carries a deleterious germ which causes the recipient of the blood to contract hepatitis, a serious liver disease. The trend in the courts has been to refuse liability,¹³ based on the underlying consideration that it is impossible to detect the germ in the blood before it is given in transfusion.¹⁴ In the typical case of blood-hepatitis, the court has been called upon to weigh the need for the product and the good which is achieved by its use against the seriousness and frequency of the risk involved.¹⁵ One authority explains that the courts must consider the possibility that the plasma supplier firms might soon go out of that business rather than face enterprise liability. This would leave a void in medical treatment much to the detriment of society.¹⁶

12. See RESTATEMENT (SECOND) OF TORTS § 402A (1965). See also note 23 *infra* and accompanying text.

13. *Fischer v. Wilmington Gen. Hosp.*, 149 A.2d 749 (Del. 1959) (defendant granted summary judgment on negligence charge even though there was a failure to warn patient of possible danger); *White v. Sarasota County Public Hosp. Bd.*, 206 So.2d 19 (Fla. App. 1968) (transaction not classed as "sale"—so no cause of action based on implied warranty of fitness); *Hoder v. Sayet*, 196 So.2d 205 (Fla. App. 1967) (Transfer of blood by hospital to patient is generally considered a service rather than a "sale." However, summary judgment denied defendant hospital because commercial blood bank was involved in transfer.); *Lovett v. Emory Univ., Inc.*, 156 S.E.2d 923 (Ga. App. 1967); (general demurrer granted—no sale); *Jackson v. Muhlenberg Hosp.*, 96 N.J. 314, 232 A.2d 879 (1967) (court granted summary judgment on strict liability and implied warranty issues because of lack of testing available to defendant; denied summary judgment on express warranty and negligence because disclaimer on bottle created an express warranty and it was possible that plaintiff might prove lack of utmost care warranted); *Payton v. Brooklyn Hosp.*, 19 N.Y.2d 610 (N.Y. App. 1967) (plaintiff's claim of breach of warranty in "sale" dismissed by trial court prior to jury trial).

14. *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 270 Minn. 151, 159, 132 N.W.2d 805, 811 (1965); "[I]t would be unrealistic to hold there is an implied warranty as to qualities of fitness of human blood on which no medical or scientific information can be acquired. . . ."

15. See James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CALIF. L. REV. 1550, 1558 (1966).

16. 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16.03(4) (1966).

PLAINTIFF'S THEORIES

The cigarette-cancer plaintiff will base his case in negligence, warranty, strict liability in tort, or a combination thereof.¹⁷ All of these theories are subject to manipulation in implementing policy decisions based upon the arguments discussed earlier.

Unlike the victim of a contaminated-cigarette, the cancer victim cannot assert that the cigarette was faultily made; it is of standard quality. This lack of defective quality would defeat a claim of negligence in production. However, if policy considerations dictate liability, the courts could readily find negligence by saying that the mere putting of the carcinogenic cigarette on the market, accompanied by advertisements and promotion, breaches a duty owed the buying public by the manufacturer.¹⁸

Similar results can be achieved with warranty. The duty in warranty is directly tied to the representations made in marketing. When the manufacturer's statement is intended to assure the purchaser against the harm which he later suffered, the case will be one of express warranty.¹⁹ Implied warranty is based on either statements or actions by the manufacturer. It is plausible for the courts to maintain that the cigarette manufacturer who places his cigarettes for sale is warranting their "wholesomeness" and that this warranty is breached when the smoker falls victim to lung cancer. But, it is also plausible that a cigarette manufacturer warrants only that his product is smokable, that is, properly made, with good, uncontaminated tobacco. The fact that it may cause injury to some susceptible persons does not lead to the conclusion that the manufacturer is an absolute insurer against all possible ills of the smoker.²⁰

Despite criticism,²¹ various forums have insisted on confusing warranty in tort with warranty in commercial sale—the

17. Rossi, *The Cigarette-Cancer Problem: Plaintiff's Choice of Theories Explored*, 34 S. CAL. L. REV. 399 (1961).

18. See note 7 *supra*. The exploding cigarette cases indicate a willingness on the part of courts to accept inferences of negligence from the mere fact of defect. This thinking can be further extended to infer negligence from the mere fact of resultant injury.

19. *Pritchard v. Liggett & Myers Tobacco Co.*, 359 F.2d 479 (3d Cir. 1965). See *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961), in which the court overruled demurrer to both express and implied warranty in advertising claims of a soap manufacturer.

20. *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

21. See Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

latter being subject to various contract rules which have grown up around it.²² The theory of strict liability in tort was developed as a staple substitute for warranty, an escape hatch for courts which felt bound by contract rules.²³ The *Restatement of Torts Second*, Section 402A, adopts the rule of strict liability in tort. This is an extension of a former *Restatement* position which had included strict liability in tort for sellers of "food for human consumption or other products for intimate bodily use" but for no other products. Cigarettes were considered among the "other products" included in the earlier exception and their manufacturers were thus subject to liability only for impurities.

If a court favors denying the cigarette manufacturer's liability, it can find support in the *Restatement* that "ordinary" cigarettes (those without some foreign substance) do not come within the definitions set forth in Section 402A. Ordinary cigarettes are not considered "defective" or "unreasonably dangerous to the user." This would be a valid refusal to extend liability to a manufacturer for an "unavoidably unsafe" product.

However, the *Restatement* is meant to be merely a statement of what the law is, not law-making itself. A court jealous of its own policy-making prerogative could disregard the *Restatement* position and find the cigarette manufacturer liable on the ground that "defective" should be synonymous with any injury-causing elements in cigarettes, unavoidable or not.²⁴

DEFENSES

In view of the fact that three major cases²⁵ have affirmed the causal connection between cigarette smoking and lung cancer, manufacturers had best labor for other defenses. Cause is

22. Among the contract rules referred to are: reliance on the part of consumer; representation or undertaking on the part of seller; Uniform Sales Act; Uniform Commercial Code; notice to seller of breach; privity and validity of contract; disclaimers. See RESTATEMENT (SECOND) OF TORTS § 402A, comment (m) (1965).

23. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A(4) (a) (1966): "If a court imposes strict warranty liability irrespective of contract and sales rules, then strict liability in warranty and tort are synonymous. . . . Many courts have been unwilling to impose strict warranty liability where one or another contract requirement was not present. Strict liability in tort offers to such courts an opportunity to circumvent or avoid the precedents that have impeded the development of strict liability in the products liability area."

24. See note 48 *infra*, and accompanying text.

25. See note 42 *infra*.

not an issue to be belittled in any future cigarette cancer case, as it remains a major point upon which the minds of reasonable men can differ.²⁶ For purposes of the present discussion though, it will be assumed that the cancer plaintiffs can and will satisfy the burden of proof of cause-in-fact.

One possible defense is assumption of the risk, since tobacco's use has long been considered hazardous to health.²⁷ Regarding this defense, it should be noted that the differences between contributory negligence, assumption of the risk, and misuse of the product can be misleading. Some courts consider contributory negligence broad enough to apply in warranty as well as in negligence cases.²⁸ Other courts are not content with the negligence term and insist on differentiations.²⁹ The failure to discover a defect, or to anticipate the possibility of one, does not

26. Note, 13 W. RES. L. REV. 782 (1962) takes the view that causation in a cigarette cancer case is a jury question whenever there is reliable medical testimony presented to establish the causal relation.

As early as 1604 the use of tobacco was termed "[a] custome Lothsome to the eye, hatefull to the Nose, harmefull to the braine, daungerous to the Lungs. . . ." The quotation is from J. ROBERT, *THE STORY OF TOBACCO IN AMERICA* 6 (1949). He points out, *id.*: "Most famous of all anti-tobacco tracts is *Counterblaste to Tobacco*, published in 1604 anonymously though soon known as the king's (James I of England) work."

27. In the same book, Robert notes that in an essay entitled "Observation upon the influence of the Habitual use of Tobacco upon Health, Morals and Property," Dr. Benjamin Rush blamed tobacco use for the death of a patient who "died of a Dropsy under my care in the year 1780. . . ." *Id.* at 106. In the period from 1830 to 1860, "the gentlemen who thought the pipe loaded with brimstone furnished an astounding list of diseases caused by tobacco. Dr. Joel Shew carefully itemized eighty-seven such ailments, the first being insanity, and the eighty-seventh cancer. In between were such deviations from normalcy as delirium tremens, epilepsy, slaving, hemorrhoids, rheumatism, gout, perverted sexuality, and impotency. . . ." *Id.* at 108. On October 23, 1945, Dr. Alton Ochsner of New Orleans, regional medical director of the American Cancer Society, announced that "there is a distinct parallelism between the incidence of cancer of the lung and the sales of cigarettes. . . ." *Id.* at 275.

28. *Maiorino v. Weco Products*, 45 N.J. 570, 574, 214 A.2d 18, 20 (1965): "[T]he well known principle of contributory negligence in its broad sense is sufficiently comprehensive to encompass all the variant notions expressed in the cited cases as a basis for refusing plaintiff a recovery when his own lack of reasonable care joined or concurred with the defect in the defendant's product as a proximate cause of this mishap and his injury."

See also *Dallison v. Sears Roebuck & Co.*, 313 F.2d 343 (10th Cir. 1962); *Hill v. Harbor Steel & Supply Corp.*, 374 Mich. 194, 132 N.W.2d 54 (1965); *Gardner v. Coca-Cola Bottling Co.*, 267 Minn. 505, 127 N.W.2d 557 (1964); *Nelson v. Anderson*, 245 Minn. 445, 72 N.W.2d 861 (1955); *Missouri Bag Co. v. Chemical Delinting Co.*, 214 Miss. 13, 58 So.2d 71 (1952); *Finks v. Viking Refrigerators*, 235 Mo. App. 679, 147 S.W.2d 124 (1940).

29. *Rasmus v. A. O. Smith Corp.*, 158 F. Supp. 70 (N.D. Iowa 1958) (contributory negligence not involved in actions for breach of warranty); *Hardman v. Helene Curtis Indus., Inc.*, 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964) ("ordinary use" within meaning of warranty of merchantability); *Nelson v. Union Wire Rope Corp.*, 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963) (warranty case involved issue of use for the purpose intended). See note 45 *infra*, and accompanying text.

make the plaintiff negligent, whereas an unreasonable use of a product after discovery of the defect and the danger will.³⁰

Basically, the defense of assumption of the risk as applied in a significant line of products liability cases is founded on the premise that the plaintiff knew of the danger but took the risk regardless of the possible consequences.³¹ It has been suggested that this defense be limited to cases in which the plaintiff truly "appreciates the danger,"³² though this suggestion should not imply need for exacting knowledge of possible injury. Thus it seems logical that the plaintiff-user of a warranted product would be charged with assuming the risk of injury if he used the product knowing of danger although the resultant injury proved to be quite bizarre.³³

Analytically, the theory fits quite neatly. Only the most naive plaintiff (perhaps the infant or incompetent) could claim complete lack of knowledge of possible harms that can ensue the smoking habit. The cancer victim should not be able to avoid the bar to recovery by asserting that although he did know that smoking could seriously impair his health, he did not expect cancer.

Practically, there are two impediments to assumption of the risk being used as a satisfactory defense by the cigarette industry. The first is the question of proof. The cigarette manufacturers are caught in a dilemma. To prove this defense, the manufacturers themselves must show that the plaintiffs knew, not of the cancer-causing aspects of smoking, but that smoking is injurious to health in general. This would be an active assertion that their own product is unhealthful. If successful the industry's legal departments could mark the file "Winner," but the public relations men would be crying, "Loser!" Thus the cigarette manufacturers must weigh the economic effects on

30. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.01 (1966). See also Comment, *Products Liability—The Expansion of Fraud, Negligence and Strict Tort Liability*, 64 MICH. L. REV. 1350 (1966).

31. Cases involving negligent design have severely limited recovery where the danger was patent or obvious. See *Kolstad v. Ghidotty*, 212 Cal. App. 2d 228, 28 Cal. Rptr. 123 (1963); *Harris v. Spencer-Harris Tea Co.*, 244 Miss. 84, 140 So.2d 558 (1962); *Jones v. Klachkin*, 22 Misc. 2d 631, 199 N.Y.S.2d 155 (1960); *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950).

32. 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 7.02 (1966) criticizes the cases cited in the preceding note on the grounds that a peril may be patent but still not appreciated, and without such appreciation of danger recovery should be allowed.

33. See *Hagy v. Allied Chemical & Dye Corp.*, 122 Cal. App. 2d 361, 265 P.2d 86 (1954), wherein the court applied the familiar principle that defendant takes the plaintiff as he finds him. Plaintiff recovered for "awakening" of cancer of the larynx by chemicals negligently escaping from defendant's plant.

the industry of either paying the costs of liability for cancer victims or downgrading the public image of their products.³⁴

The second impediment is the medical theory of addiction.³⁵ If it is legally provable that smoking is addictive, then the plaintiff may have the possibility of claiming that he began to smoke only with the thought of trying it out—hardly assuming a risk of great injury from a few experimental smokes—but soon became “hooked” on the habit. This would seem to be valid rebuttal to assertions that he assumed the risk of cancer or other great injury.

Chronology becomes significant in the assumption of the risk defense. Yesterday’s plaintiff was a victim who began smoking before the cancer scare and relies on ignorance of the danger. Presumably the knowledge of today’s smoker may prevent his recovery unless he can prove addiction. In the future, if addiction is actually proved and publicized, even tomorrow’s plaintiff may not be able to claim lack of knowledge of the inherent risks—he will assume the risk not only of cancer, but of addiction, too. Thus the success of a plaintiff seems limited by his place in time. However, a supposition so vague seems a poor answer to an industry’s concern over potentially devastating judgments.

When mention is made of possible defenses, the mind is likely to turn to the warning on cigarette packages: “Caution: Cigarette Smoking May Be Hazardous to Your Health.”³⁶ This writer would hazard a prediction that this package warning, if it ever were to become an issue in a cigarette-cancer case, would be legally ineffectual as a defense. This prediction is based on the “duty to warn” cases, the cases involving food and drug legislation, and the nature of the warning itself. In the products liability field, the manufacturer is bound to inform the potential user of dangerous propensities inherent in the product itself or of special instructions necessary for the safe and proper use of his product.³⁷ That the manufacturer failed in either requirement has been held negligence, without proof of further lack of care in

34. See note 10 *supra*, and accompanying text.

35. Kessler, *More Than a Habit?*, The Wall Street Journal, July 1, 1968, at 1: “[S]ome research physicians and other scientists are beginning to talk about cigarette smoking in a new context—as a genuine ‘addiction’ like that induced by such drugs as morphine and heroin.”

36. Such warning is required by the Federal Cigarette Labeling Act of 1965.

37. See Dillard & Hart, *Product Liability: Directions for Use and the Duty To Warn*, 41 VA. L. REV. 145 (1955).

the manufacturing process causing a defective product.³⁸ However, the fact that there was a warning of sorts did not prevent recovery when it was found the warning was inadequate or too limited in scope.³⁹ Similarly, compliance with requirements established for warnings by food and drugs statutes has not been *per se* sufficient to exonerate the producer from liability.⁴⁰ Finally, warning on the cigarette packages has been required by Act of Congress. Opinions expressed in the congressional debates prior to passage indicated that the purpose of the warning requirement was not connected with possible tort duties of the manufacturers.⁴¹

MAJOR CIGARETTE CASES

Three cases have dominated the cigarette-cancer litigation scene: *Lartigue v. R. J. Reynolds Tobacco Co.*, *Pritchard v. Liggett & Myers Tobacco Co.*, and *Green v. American Tobacco Co.*⁴²

In *Lartigue*, the plaintiff based her claim on negligence and breach of warranty. Defendants pleaded contributory negligence and assumption of the risk. The Fifth Circuit affirmed the trial court judgment for the defendant stating that the "scope" of implied warranty did not include cigarettes which were uncontaminated.

38. *Crane v. Sears Roebuck & Co.*, 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963) (no defect in surface preparer, but warning was necessary because of latent dangerous characteristics); *Tampa Drug Co. v. Wait*, 103 So.2d 603 (Fla. 1958) (label contained no specific directions as to use for any particular purpose); *Farley v. Edward E. Tower & Co.*, 271 Mass. 230, 171 N.E. 639 (1930) (statement that product was not designed for a particular use was not equivalent to warning of hazard).

39. *Boyl v. California Chemical Co.*, 221 F. Supp. 669 (D. Ore. 1963) (inadequate warning on weed killer); *Williams v. Caterpillar Tractor Co.*, 149 So.2d 898 (Fla. App. 1963) (question of adequate warning on bulldozer); *McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 181 N.E.2d 430, 226 N.Y.S.2d 407 (1962) (inadequate warning on emergency heat blocks).

40. *Tampa Drug Co. v. Wait*, 103 So.2d 603 (Fla. 1958) (minimum federal requirements for labeling); *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A.2d 850 (1945) (label approved by Surgeon General would not premit imposition of liability).

41. The purpose, rather, was "action" in response to the Surgeon General's report. See notes 1-4 *supra*.

42. *Lartigue v. R. J. Reynolds Tobacco*, 317 F.2d 19 (5th Cir. 1963); *Pritchard v. Liggett & Myers Tobacco Co.*, 134 F. Supp. 829 (W.D. Pa. 1955), *reversed*, 295 F.2d 292 (3d Cir. 1961); *Green v. American Tobacco Co.*, 391 F.2d 97 (5th Cir. 1968).

Although the writer has selected the above cases for emphasis, two other cases are significant: *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964) (lower court had properly instructed the jury that manufacturer's warranty did not cover substance in manufactured products, harmful effects of which no human skill or foresight could afford knowledge); *Cooper v. R. J. Reynolds Tobacco Co.*, 256 F.2d 464 (1st Cir. 1958) (summary judgment for defendant manufacturer was affirmed because no proof of advertisement containing claim that cigarettes were healthful). See also Annot., 80 A.L.R.2d *Products Liability* § 3 (1961).

The *Lartigue* court seemed aware of the policy decision which it was being asked to make, as illustrated by the following language: "The same public policy reasons which justify holding a manufacturer to strict liability for food products apply to cigarettes [C]ourts have applied the rule to foreign substances in cigarettes and chewing tobacco. [Cited cases omitted.] In all of these cases the injury was caused by a foreign substance or by spoiled food. The risk of such injuries is incident to the business Public policy demands that the burden of any accidental injuries caused by such products be placed upon those who produce and market the products and know the risks. The injuries from knowable risks are a cost of production for the industry to bear; they are passed on to consumers But it is reasonable to draw a line somewhere: a manufacturer of food products is not like one who keeps a tiger for a pet in a crowded city. . . . Strict liability on the warranty of wholesomeness, without regard to negligence, 'does not mean that goods are warranted to be foolproof or incapable of producing injury.'"⁴³

This language evidences a distinct recognition of the policy issue and demonstrates the court's decision not to place ordinary cigarettes within the "defective" product category of Restatement 402A.⁴⁴

In *Pritchard*, the Third Circuit Court of Appeals remanded⁴⁵ for a new trial on the grounds that the jury's finding the plaintiff smoker has assumed the risk was unsupported by the evidence. The court pointed out that assumption of the risk can be a defense to breach of warranty, but contributory negligence cannot. It felt the jury should have been instructed as to the differences between assumption of the risk in its primary sense (identical to contributory negligence) and its secondary sense (misuse of a product or acceptance of a danger with knowledge of the danger). The breach of warranty in *Pritchard* was different from *Green* and *Lartigue* in that it involved an alleged express

43. 317 F.2d 19, 36-37 (5th Cir. 1963).

44. The court in explanation interpolated other language indicating that strict liability is to be applied only when damages are foreseeable. It is submitted that foreseeability of harm is irrelevant to the issue of whether or not ordinary cigarettes are "defective." However, this was *Lartigue's* only deviation toward confusion.

45. The court of appeals had earlier reversed the trial court's directed verdict for the defendant, stating that the issues of breach of implied warranty of merchantability and of negligence vel non in the manufacturer's failure to conduct sufficient tests to determine if the use of its product caused cancer were both for the jury.

warranty—a series of advertisements based on the non-harmful-to-health aspects of Chesterfield cigarettes. The court of appeals could not accept the assumption of the risk defense offered by the same manufacturer that had advertised that the danger allegedly assumed by the plaintiff did not exist. Most notable about the *Pritchard* case is the concurring opinion by Judge Goodrich. Alluding to foods and drink that are potentially harmful to susceptible persons or dangerous if used in excess, such as butter, salt, and whiskey, he indicated the manufacturers of such products would not be liable for injuries caused by their ingestion in the absence of assurances to the customer or impurities in the product. It is submitted that this view is correct. The issue of assumption of the risk which occasioned another return of the case to the lower court led the case on a tangent. Had the court determined that it was simply contrary to public policy to allow this defense in the face of an express warranty, it could have been direct about the decision rather than require the jury to become entangled in abstract definitions of assumption of the risk which it might find difficult, if not impossible, to distinguish.

The history of *Green v. American Tobacco Co.*⁴⁶ is discouraging for anyone searching for definition of the cigarette manufacturer's duty to the public.

Green has been in litigation since December 1957. The first jury trial ended in a general verdict for defendant, with special interrogatories pertaining to cause and to foreseeability of the cancer-causing qualities of cigarettes. The Fifth Circuit Court of Appeals affirmed the verdict for defendant, but shortly thereafter decided to grant a petition for rehearing to allow certification of the question of scienter by the manufacturer to the Florida Supreme Court.⁴⁷ The answer concluded there was no state precedent for limiting liability because of unforeseeability of defect.

46. 391 F.2d 97 (5th Cir. 1968).

47. The question read: "Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty . . . when the defendant manufacturer and distributor could not . . . by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung?" 304 F.2d 70, 86 (5th Cir. 1962).

The Florida Supreme Court introduced its answer with this caution: "[T]he question thus framed does not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a *matter of law* unmerchantable in Florida under the stated conditions, nor does it request a statement of the scope of warranty implied in the circumstances of this case." 154 So.2d 169, 170 (Fla. 1963).

Following certification to the Florida Supreme Court, the Fifth Circuit reversed the former judgment for defendant on the ground that, in light of the certification opinion, the district court's instruction to the jury was erroneous. Despite a vigorous dissent, the majority felt it could not render judgment for plaintiff on the issue of liability because "the jury has not made any sufficient finding on the question of reasonableness, that is, as to whether or not the cigarettes were 'reasonably fit and wholesome.'"⁴⁸

The district court was cautioned not to re-litigate the issue of cause already decided, but adhere to the issue of a reasonably fit and wholesome product.⁴⁹ This second jury trial resulted in another victory for defendant, which, in 1968, the Fifth Circuit again found necessary to reverse on the grounds that Florida law now called for a finding of liability as matter of law.⁵⁰ The 1969 chapter of *Green* came after an en banc rehearing by the Fifth Circuit's eleven judges. In a one-paragraph statement, the majority simply held that the earlier jury ruling of no liability because defendant could not have known the smoker would develop cancer should stand.⁵¹

It is difficult to imagine a case more congested with extraneous issues than *Green*. The Fifth Circuit's change of mind in granting the certification to the Supreme Court of Florida was just the first step in a series of erroneous and unnecessary ones. But even after the certification was made, it was error to call for submission to the second jury of what should have been a conclusion of law rather than of fact. It is submitted that the Florida Supreme Court did not contemplate this result; in denying the knowledge-factor it was safe-guarding decisions in other cases where knowledge of the manufacturer is immaterial.⁵² Further, the Florida Supreme Court did not contemplate its language being used to extend the "scope" of warranty as declared in *Lartigue*.

Thus the major cases are varied in approach and are for

48. 325 F.2d 673, 676 (5th Cir. 1963).

49. By submitting the issue of whether or not the cigarettes were reasonably fit and wholesome the court of appeals was placing a completely unrealistic burden on the next jury and the trial judge. How were they to determine reasonable fitness without re-considering the testimony of expert witnesses, which was tantamount to re-litigation of medical cause-in-fact?

50. 391 F.2d 97 (5th Cir. 1968).

51. Morning Advocate, April 9, 1969, at 1, col. 3.

52. *Sencer v. Carl's Markets*, 45 So.2d 671 (Fla. 1950) (can of sardines defective); *Cliett v. Lauderdale Biltmore Corp.*, 39 So.2d 476 (Fla. 1949); *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So.2d 313 (1944).

the most part adept at skirting or confusing the issues. *Lartigue* limits the "scope" of warranty to relieve the manufacturer of liability for a product that is truly not defective. *Pritchard* has become side-tracked on the semantics of defenses. *Green* has vacillated between considering the manufacturer's human skill and foresight controlling and not controlling. Hopefully the trend just begun will not continue, but rather will be avoided by a more realistic appreciation by the courts of their policy-forming functions.

ALTERNATIVES

It seems desirable that the cigarette-health problem not remain entirely in the judicial system for a case-by-case formulation of policy. In view of the arguments against curbs on the cigarette industry, the courts seem to be the improper institution for ultimate decision of the issue. Unlimited liability imposed by juries can too easily lead to indirect prohibition, a matter for popular decision. An industry as important as the tobacco industry needs a more studied and predictable method for bearing its load of financial responsibility to the buying public. Finally, an open-door to liability for "unavoidably unsafe" products is too productive of dire economic effects on other industries.

However, this writer does see a need for the industry to pay the costs of cigarette-linked diseases, and is in favor of liability, but by means of a statutory scheme.

A striking parallel to the cigarette-cancer question was noted earlier in the policy formulated for the blood-hepatitis cases. Although the majority of cases have denied liability, there has been some statutory policy-making in that area.

A few states have passed legislation to prevent the blood suppliers from being held liable, but not without criticism: "[I]n protecting one small group from strict liability in warranty, the statute opens the way for similar types of legislation in behalf of other groups which can make equally appealing arguments for protection . . . [I]t may be suggested that this statute goes about the matter in the wrong way, by a 'shotgun' approach eliminating all possibility of liability for breach of warranty regardless of the circumstances."⁵³ If liability-limiting legislation is politically feasible for the blood problem, it is at least possible for the cigarette problem, although there will prob-

53. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.04(3) (b) (1966).

ably be more public opinion expressed against the cigarette industry's interest than against the blood manufacturers'.

Tobacco and whiskey are often compared within the framework of cigarette-cancer discussion, but the fact that many states have in the past tried cigarette-prohibition is often overlooked. In 1915 nine states had cigarette-prohibition laws on the books, although they were rarely enforced.⁵⁴

The tobacco-whiskey comparison may be suggestive of a possible solution. A carry-over from whiskey prohibition days is the Illinois Dram Shop Act.⁵⁵ The Act establishes a system "to distribute a part of the inevitable costs of the human misery and suffering that flows from intemperate drinking among all those who purchase intoxicants"⁵⁶ In short, it is legislatively enacted enterprise liability. Connecticut has a similar act, and both states subject the seller of liquor to liability without requiring proof that the sale was illegal or was made to a person known to be intoxicated. Nineteen other states have Dram Shop Acts, but they do require such proof.

The Illinois statute has not done away entirely with the tort character of the award, since recovery is denied to the person whose voluntary intoxication resulted in his own injury; the injury must result from the sale of liquor.

However, the awards are limited, making this a controlled liability similar to workmen's compensation. Overall recovery cannot exceed \$15,000 in case of a single injury by the intoxicated person or \$20,000 for loss of support. The distinguishing feature is that the Dram Shop awards more closely resemble general damages, whereas compensation is usually geared to loss of earning or capacity to earn. It is the limited liability of the Dram Shop Act which makes it feasible for the liquor sellers to carry protective insurance.

Similar legislation might very well serve all interests in the cigarette-cancer problem. Knowing they are facing only a limited liability, the cigarette manufacturers would be able to carry insurance to cover awards. In turn the cost of the insurance could be passed on to all cigarette buyers in the cost of the product. Yet the unfortunate lung cancer victim would not be without assistance in paying his medical tolls.⁵⁷

54. See J. ROBERT, *THE STORY OF TOBACCO IN AMERICA* 248 (1967).

55. ILL. REV. STAT. § 135 (1961).

56. W. MALONE & M. PLANT, *WORKMEN'S COMPENSATION* 68 (1963).

57. See Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965).

CONCLUSION

Although this writer finds an affirmative answer to the initial question of legal policy unavoidable, it must be a qualified answer. The cigarette industry should pay costs in public health brought about through the use of tobacco, because this is the most reliable way to distribute costs to the smoker and relieve the non-smoker of the financial burden. Nevertheless, the conflicting needs of the industry and disease victims can be adjusted more effectively through legislative action. Available tort theories are mere vehicles for policy decisions, and case results will depend more on policy considerations than on legal maneuvers. Although this is implicit in the cases reported to date, each case reflects a rather myopic view of the entire cigarette-health problem. The reports illustrate the limitations of handling this broad problem of public health through products liability litigation alone.

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